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CHARLES ELMORE CROPL
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Supreme Court of the United States

October Term, A. D., 1949.

No. 382

IRVINE F. BELSER, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

IRVINE F. BELSER,
CARLISLE ROBERTS,
W. CROFT JENNINGS,
C. T. GRAYDON,
W. S. PRITCHARD,
Attorneys for Petitioner.

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No._____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition to have this Court review a decision of the Court of Appeals for the Fourth Circuit (174 Fed. (2d), Ad. Sh. 4, 386), which affirmed the conclusions, but not all the findings, of the United States Tax Court, (see 10 T. C. 1031). The decision of the Tax Court, rendered Au-

gust 11, 1948, assessed a deficiency tax against petitioner for the year 1932 of $3,675.66 and a penalty of $918.92 for alleged delay in filing his income tax return.

The petition to the Court of Appeals challenged the decision of the Tax Court: (1) for assessing a penalty amounting to $918.92 against the petitioner for alleged delay in filing his income tax return for 1932, (2) for failure to allow a loss of $14,400.00 in the stock of the Fairview Farming Company, and (3) for failure to allow as bad debts loans to the Fairview Farming Company aggregating $9,600.00.

Upon petition for rehearing, the Court of Appeals modified its initial opinion by eliminating a finding that the lands involved were worth only about $10.00 an acre in 1922 (See Order on Petition for Rehearing).

• • •

The final determination by the Commissioner was not made until January 11, 1939, and, owing to the fact that petitioner was in the military service during the Second World War from July 1941 through March 1946, the case did not finally come on for hearing before the Tax Court until October 22, 1947. (Petitioner was also in the First World War from April 1917 through December 1918.)

• • •

The essential facts involved in this matter are undisputed and the case turns wholly upon the application of the proper legal principles to the undisputed facts.

Petitioner is a lawyer and has practiced law in the City of Columbia, South Carolina from 1915 to date (except for two periods of military service). Petitioner is now, and has been since 1932, General Counsel for the South Carolina Public Service Commission.

• • •

I.

AS TO THE PENALTY

In regard to the penalty of $918.92 for alleged delay in filing the income tax return, the facts are:

Petitioner, having requested an additional extension of time beyond September 15, 1933 for filing the income tax return for 1932 and having been advised to file such return as soon thereafter as possible together with an explanatory affidavit, thereafter prepared his income tax return and left the same, on September 27, 1933, (R. 17)[1] together with a letter in affidavit form and a check (for $62.05) in payment of the tax, with his secretary for mailing (R. 8). About the same time, petitioner prepared a State Income Tax Return showing the same gross income (about $38,000.00), and claiming the same losses ($24,000.00) and the said return was duly received by the State Tax Commission (R. 8).

In May 1935, upon being informed by Mr. Gantt, an agent of the Commissioner, that the Collector had no record of receiving petitioner's 1932 return, petitioner exhibited to the said agent an office copy of his return, together with his pencil notes and statement in regard to the loss. (R. 9, 18; Tr. 106, 172-173, Ex. 19, N.)

Subsequently, upon being advised by Mr. Gantt that petitioner had included in his 1932 return some fees received from the State of South Carolina which he should not have reported, petitioner, in July 1937, filed with the Collector, along with a copy of the return prepared on September 27, 1933, an amended return omitting such fees (Tr. 172-173; Ex. N).

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[1] The record references are to the Appendix to Petitioner's Brief before the Court of Appeals for the Fourth Circuit.

Upon the trial of the case before the Tax Court, several employees of the Collector's office at Columbia testified that they had no record of the receipt of the 1932 return; but Mr. Gantt did not testify. Petitioner's stenographer reiterated the testimony given in her affidavit, furnished to the Collector's office in September, 1935, and testified that to the best of her recollection and in accordance with her practice, she had duly mailed the return (R. 17-18, 23-29).

On this point, the Tax Court refused to find affirmatively that the return had been mailed (R. 18) and the Court of Appeals held that the evaluation of the testimony and the determination of what constituted willful neglect "are peculiarly within the province of the Tax Court", and hence, affirmed the Tax Court's imposition of the penalty (C. A. Op. 11).

On this point, petitioner asserts the position, (1) that the Court has committed error of law in failing to make its own determination as to what constitutes willful neglect, especially in view of the duties of the Court as defined in the Internal Revenue Code, Section 1141 (a), effective September 11, 1948; (2) that the Tax Court and also the Court of Appeals should have found that the return had been duly mailed on September 27, 1933; (3) that in any event, even if the stenographer failed to mail the return, petitioner should not be penalized for his stenographer's negligence; (4) that this holding is contrary to the universal principle that penalties are to be strictly construed; and (5) that such ruling places it within the power of the Commissioner to impose a 25% penalty upon a taxpayer, even though the loss of the return may be due to the negligence of the clerks of the postoffice or the collector's office.

II. & III.

AS TO THE INVESTMENTS IN STOCK AND LOANS TO FAIRVIEW FARMING COMPANY

Both courts have found that the investments in the stock ($14,400.00) and in the loans ($9,600.00) to the corporation were actually made (though the courts recognized the loans only to the extent of $9,500.00 in mortgages) and were lost, the only question thereabout being as to the year of the loss.

Petitioner controlled all the stock of the corporation, (though fifty shares were in the name of his wife), and was the principal officer and director.

Due to the fluctuation in the prices of cotton,[2] by which the value of the lands were largely determined, the corporation never declared any dividends, and never acquired any additional assets (Tr. 135), and the affairs of the corporation, as well as of petitioner, during this period, became considerably involved.

The history of the corporation consists largely of the efforts made by petitioner and the corporation to conserve these assets and to salvage petitioner's investment therein.

Down to 1932 petitioner made no effort to charge off or claim any losses in his investments in the company or to liquidate the company, both because the price of cotton and hence the value of land maintained a fairly good average down to 1930-31 and hence it was impossible to know whether such investments were lost, and also particularly because the National Loan and Exchange Bank (hereafter called the Bank) held (under pledge) half the stock of the corporation and obligations of the corporation covering the

[2] An illustration of the drastic fall of cotton prices to a low of 5.89 cents per pound in 1932 is shown by the exhibit in the petition for rehearing, p. 3.

corporation's property, and there were also other creditors (Tr. 160). Petitioner considered it was impossible for him to liquidate the corporation or to treat the transaction as closed as long as the Bank held half the stock and there were other obligations covering the corporation's property (R. 22).

In 1932, however, petitioner had a final settlement with the Bank, redeemed the 100 shares of stock theretofore held by the Bank, reacquired control of the mortgage (for $18,500.00, reduced to $17,500.00) covering the Stewart tract, and in view of the prevailing low price of cotton decided to, and did, liquidate the corporation, (R. 22, Tr. 133-134). In so doing, he treated the Stewart and DePriest tracts as liquidating dividends to the extent of the amount of the money originally borrowed thereon, $10,000.00 and $7,200.00 respectively, and charged off his investment of $14,400.00 in the stock and his loans aggregating $9,600.00 as a loss. Accordingly petitioner set up and claimed these losses aggregating $24,000.00 both in the returns to the State Government and to the Federal Government for the year 1932, (R. 22; Tr. 133-134, 136, 165-166, Ex. 7, N).

Petitioner asserts the position that these losses were fixed in the year 1932 by the concurrence of three events, to wit: (1)-the low price of cotton, (2)-the reacquisition of the stock and control of the assets and obligations of the corporation, and (3)-the liquidation of the corporation in that year.

• • •

As to the foregoing facts, there was no dispute, and no conflict, in the evidence, which consisted in large part of documentary evidence.

On this point, as to the loss in the stocks, the Tax Court found that the loss occurred "Prior to 1932" (R. 10-13) and

the Court of Appeals affirmed this conclusion (C. A. Op. 11), but neither Court made any finding as to the specific year in which the losses are alleged to have occurred.

The Tax Court had found that the lands involved were worth only "about $10.00 an acre in 1922" (R. 6) and the initial opinion of the Court of Appeals had contained a substantially similar finding (C. A. Op. 5). This finding, however, was wholly without any support in the record, and on the contrary, the uncontradicted evidence showed that the DePriest tract, 331 acres, was officially appraised in 1922, at the time of the loan from the First Carolinas Joint Stock Land Bank, at $16,785.00, a valuation of approximately $50.00 per acre. (Petition for Rehearing, 2.) When this fact was drawn to the attention of the Court of Appeals by petition for rehearing, that Court ordered that such finding be eliminated from its opinion (See order on petition for rehearing). This order of the Court of Appeals, constitutes in effect a reversal of the finding of the Tax Court on this point and we submit wipes out any basis for a finding that the stocks and loans had lost their value prior to 1932 so far as the value of the lands was concerned.

It is believed that this erroneous conclusion and finding by the courts as to the value of the land in 1922 was the dominating factor in the courts' conclusions on this point. There was no other finding by either court as to the value of the lands in any other year.

The finding of the Court of Appeals as to the alleged worthlessness of the stock, must therefore be predicated upon the theory that the conveyances by the corporation of the DePriest tract to petitioner in 1922 and of the Stewart tract to the Bank in 1924 had deprived the stockholders of any interest in these lands. The Tax Court's opinion had contained a somewhat similar finding (See R. 10), though

that Court did find that it would have sustained the taxpayer's claim that he held this land for the benefit of the corporation and the stockholders but for the subsequent conveyance of the DePriest tract by him to Fairview Company in 1930 (See R. 10-11). Thus the Tax Court, in effect recognized that the stockholders retained an interest in the DePriest tract, at least down to 1930.

The Court of Appeals, however, did not discuss, and apparently did not consider, the record, which showed, as stated in the corporation's resolution, that the DePriest tract was conveyed to the petitioner solely for the purpose of making a loan for the benefit of the corporation or the petitioner's uncontradicted evidence that he held the land for the benefit of the corporation and its stockholders (See Tr. 136, R. 22), and which showed that the conveyance of the Stewart tract was regarded as a "tentative transaction" and was, in effect, treated as a mortgage, and was redeemed in 1930-32, (Tr. 159-160).

Nor did the Court discuss, or consider, South Carolina statutes, sections 7704, 7710, and 7711 (Code of Laws, 1932), which expressly made the petitioner a trustee of the corporate property for the purpose of dividing such property and capital among the stockholders. Nor did that Court discuss or consider the legal principle as illustrated by the uniform decisions of the courts that such conveyances by a corporation of its lands to a director are presumed to be in the interest of the corporation and are to be impressed with a trust in favor of the corporation and its stockholders.

On this point, petitioner takes the position that the Court of Appeals and also the Tax Court committed an error of law in failing to hold and find that the conveyance of the DePriest tract to petitioner in 1922, for the purpose of making a loan for the benefit of the corporation, and also

the conveyance of the Stewart tract to the Bank in 1924 as additional security to stock and other obligations of the company held by the Bank, did not deprive the stockholders of the corporation of any interest in these tracts of land; and in failing to hold that petitioner held both tracts as trustee for the benefit of the corporation's stockholders, either in his own name or in the name of the successor company, Fairview Company, down to 1932 when he liquidated the corporation, and in holding that the losses did not occur and could not be represented by any closed transaction, as required by the regulations, down to the time of liquidation in 1932.

* * *

As to the claimed loss of $9,600.00 in the loans to the corporation, the Court of Appeals apparently applied the same test as it applied in the case of the stocks but, again, the court did not make any specific finding as to the year in which petitioner must have ascertained such losses.

The Court of Appeals apparently placed some emphasis upon the fact that petitioner had cancelled the mortgages aggregating $8,500.00 on the Stewart tract at the time of the redemption of that tract from the Bank and reconveyance of such tract to Fairview Company in 1930, but the Court entirely overlooked the fact that these satisfactions did not affect, or apply to, the $1,000.00 mortgage held by petitioner covering the DePriest tract. On this point, the Tax Court had held as a matter of law that the $1,000.00 mortgage of the DePriest tract was merged at the time of the conveyance of that tract to petitioner in 1922. The Court of Appeals, however, did not discuss this legal question of merger and apparently thought that the $1,000.00 mortgage was satisfied in 1930.

On this point, petitioner asserts the position, in regard to the $1,000.00 mortgage on the DePriest tract, that the

mortgage was not merged at the time of the conveyance of the land to him since it was to his interest to retain the mortgage. As to the satisfactions of the two mortgages aggregating $8,500.00 on the Stewart tract, it is his position that these mortgages did not extinguish the debt of the corporation to him and that the satisfactions were based upon other valid considerations including the satisfaction by the Bank of the $10,000.00 Insurance Company mortgage then held by the Bank, but, on the contrary, that petitioner's mortgages were transmuted into the substituted $18,500.00 mortgage of the Fairview Company to the Bank and that as between him and the corporation he was subrogated to a corresponding interest therein.

It is therefore petitioner's position that the loans did not become bad debts and were not ascertained until the year 1932 because: (1)-it was not until the year 1932 that it could be said with any certainty that the loans were not collectible, and (2)-because in that year, and not before, petitioner actually ascertained and claimed the loss.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28 USC 1254 (Judicial Code Section 240):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The decision of the Court of Appeals was dated May 2, 1949, and the order on petition for rehearing was dated June 13, 1949, and directed the issuance of the mandate within five (5) days. The time for filing the petition for writ of certiorari was duly extended by order of a Justice of this Court to October 11, 1949.

THE QUESTIONS PRESENTED

The questions presented are:

A.

Whether the Court of Appeals erred as a matter of law in holding and finding that it was within the peculiar province of the Tax Court to determine what constitutes willful neglect, and in affirming the imposition of the penalty, in that under Section 1141 (a) of the Internal Revenue Code, effective September 11, 1948 and under the applicable decisions it was the duty of the court to make its own determination on this point?

B.

Whether, it being established and found that petitioner, in accordance with instructions from the Collector's office, prepared and delivered his return, together with an explanatory letter of transmittal, to his stenographer for mailing on September 27, 1933, and his stenographer having testified that according to her best recollection she mailed said letter and return according to her practice, the Court erred as a matter of law in affirming the finding of the Tax Court that petitioner was to be charged with willful neglect, especially in view of the legal principle that penalties are to be strictly construed?

C.

Whether the Court of Appeals erred, as a matter of law, in holding that the stock in the Fairview Farming Company was worthless prior to 1926 for the alleged reason that the corporation had previously conveyed the DePriest tract to petitioner and the Stewart tract to the National Loan and Exchange Bank, and in failing to hold that, under the admitted facts and under the legal principle, that conveyances by a corporation to a director are presumed to be for the benefit of the corporation, and under the South Carolina

statutes, Sections 7704, 7710, and 7711[3], the stockholders continued to have an interest in the DePriest tract and the Stewart tract down to the time of the liquidation in 1932?

D.

Whether the Court of Appeals erred as a matter of law, in finding that the loss of $14,400.00 in the stock of the Fairview Farming Company occurred in a year prior to 1932 without specifying which year, and in failing to hold and find that under the law and regulations, the loss in the stock did not, and could not, occur until it was represented by a closed transaction, to wit: the liquidation of the corporation by petitioner in 1932?

E.

Whether the Court of Appeals erred, as a matter of law, in holding and finding that for the same reasons as were applicable in the case of the stock, petitioner must have realized and ascertained his loans ($9,600.00) to the corporation to be bad debts long before 1932 in that the mortgages of the corporation to petitioner would not be, as a matter of law, affected by the conveyances by the corporation of its property, which were held by the court to account for the alleged loss in the stocks?

F.

Whether the Court of Appeals erred in holding that its conclusion that petitioner had ascertained the mortgages to be worthless prior to 1932 was "strengthened" by the alleged fact that petitioner had cancelled the mortgages in 1930 in that (1)-under the undisputed facts, the cancellations did not affect the $1,000.00 mortgage covering the DePriest tract in which there was a substantial equity, and (2)-the satisfactions by petitioner of the mortgages aggre-

[3] Sections 7704, 7710 and 7711 of the Code of Laws of South Carolina, 1932 are printed in petitioner's brief filed herewith.

gating $8,500.00 on the Stewart tract in 1930 were supported by other valid considerations, including the satisfaction by the Bank of the $10,000.00 mortgage to the Fidelity Mutual Life Insurance Company, and petitioner was subrogated to a corresponding interest in the substituted $18,500.00 mortgage by the Fairview Company?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Because, we respectfully submit, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by the Tax Court as to call for an exercise of this Court's power of supervision in that as to the imposition of the alleged 25% penalty upon the taxpayer, the Court has departed from the universally accepted principle that penalties are to be strictly construed; and in this case, notwithstanding a finding that the taxpayer had prepared his income tax return and delivered it to his secretary for mailing (R. 8), the Court has sanctioned the imposition of the penalty. (Supreme Court Rule (New) 38 (5) (b)).

"It is not the purpose of the law" as was said by the United States Supreme Court in *Spies v. United States,* 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418, and quoted in the below cited *Hatfried case* "to penalize * * * innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. * * *"

In *Hatfried, Inc. v. Commissioner* (C. A. 3), 162 F. (2d), 628 in which the failure to file was due to the mistake of public accountants, and in which the Court of Appeals for the Third Circuit reversed a finding of the Tax Court imposing a penalty, the Court said:

"Further, it is well-settled that in the application of penalties 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.' Crawford, Statutory Construction, Section 240, page 462."

To the same effect is *Girard v. Commissioner* (C. A. 3), 122 F. (2d), 843, *certiorari* denied 314 U. S. 699, 86 L. Ed. 559.

In the above cited *Hatfried case,* the court cited and discussed many cases, both from the Tax Court and other courts: (*Three States Lumber Co. v. Commissioner,* 5 T. C. 1391; *C. R. Lindback Foundation v. Commissioner* 4 T. C. 652, 150 F. (2d) 986; *Tarbox Corporation v. Commissioner,* 6 T. C. 35; *Dayton Bronze Bearing Co. v. Gilligan,* C. A. 6, 281 F. 709) which hold in effect that where the failure to file as provided by the statutes and regulations is due to the mistake or error of some other person upon whom the taxpayer had a right to rely, the imposition of the penalty is improper.

Also, in *Bouvelt Realty Inc. v. Commissioner,* 46 B. T. A. 45, in which the petitioner prepared and executed a return but the same was not filed due to inadvertence of an employee, it was held by the Tax Court that no penalty should be imposed and the Commissioner's determination of assessing the penalty was reversed.

"In the circumstances", said that Court, "we think it may be said that there was a reasonable cause for the failure to file on time. *Carnie-Goudie Manufacturing Co.,* 18 B. T. A. 893. We are not unmindful of the grave necessity for the timely filing of tax returns, but the imposition of the penalty is not made mandatory by the statute. Congress was fully alive to the fact that there would be occasions where responsible officers of corporations had taken every safeguard for filing their returns and yet something went

wrong. We are of the opinion that on these facts the penalty should not be imposed. **Decision will be entered for the petitioners.**"

That case is in all essential respects on all fours with the case at bar.

It is earnestly submitted that to allow the imposition of a 25% penalty on the petitioner under these facts and circumstances would be an intolerable injustice, and that if such 25% penalty should be imposed under these circumstances, then every citizen of this country is in danger of having a 25% penalty assessed against him for failure to file a return in time, even though the loss of such return may be due to some undetermined cause, whether to the negligence of his secretary, or of the employees of the post-office, or of the employees of the Commissioner himself.

II.

The decision of the Court of Appeals in this case, it is submitted, is in conflict with the decision of the Court of Appeals for the Third Circuit in *Hatfried v. Commissioner, supra*, and probably with the applicable decisions of this Court, in that in the case at bar the Court has decided that the determination of what constitutes reasonable cause or willful neglect is "peculiarly within the province of the Tax Court", whereas in the above cited *Hatfried* case the Court expressly held that what elements constitute reasonable cause or willful neglect is a question of law upon which the court must make its own determination.

In the *Hatfried* case, the taxpayer, relying upon the advice of certified public accountants, failed to file a personal holding company surtax return and the Commissioner and the Tax Court assessed a deficiency tax and a penalty for the year 1941.

The Court of Appeals reversed the decision of the Tax Court.

"The Courts, as above stated, have ruled" said the Court, "that 'reasonable cause means nothing more than the exercise of ordinary business care and prudence' and 'willful' as intentional or knowing or voluntary". * * *

"It is evident from the foregoing that (1) the finding that there was no 'reasonable cause' was without 'substantial basis'; and (2) the Tax Court erred as a matter of law in the interpretation of the legal content of the words 'reasonable cause' and 'willful neglect' as used in Section 291.

"Whether, in a given situation, the elements which constitute 'reasonable cause' or 'willful neglect' are **present** is a question of fact; what elements **must** be present to constitute 'reasonable cause' or 'willful neglect' is a question of law. It is sun clear that in making its determination as to whether on the facts there was 'reasonable cause', the Tax Court must apply the legal standard or measure contained in that term. * * *

"The irrefragable conclusion from the record is that the taxpayer here, in fact and in law, exercised such ordinary business care and prudence as to bring him within the rule that 'reasonable cause means nothing more than the exercise of ordinary business care and prudence', and that there was no 'willful neglect' ".

It is submitted that this decision of the Court in the case at bar is essentially in conflict with the above cited decision of the Court of Appeals for the Third Circuit, which was a well reasoned decision, citing and quoting from many decisions from other courts of appeals and from this Court including particularly *Commissioner v. Scottish American Investment Co., Ltd.*, 323 U. S. 119, 124, 65 S. Ct. 169, 171, 89 L. Ed. 113, and *United States v. Murdock*, 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381.

The decision of the court, on this point it is submitted, is also essentially in conflict with the decision of this Court

in the below cited *Bogardus v. Commissioner* case, 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32, in which the Court held that "a conclusion of law or at least a determination of a mixed question of law and fact * * * is subject to judicial review, and on such review, the court may substitute its judgment for that of the board."

III.

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court," (Supreme Court Rule (new) 38, par. 5 (b)), in that under the recently enacted Section 1141 (a) of the Internal Revenue Code, effective September 1, 1948, it was expressly provided that the Courts of Appeals should have "jurisdiction to review the decisions of the Tax Court * * * in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"; whereas, in the case at bar, it is submitted, the Court of Appeals has not followed the purpose underlying the said enactment and the extent of the Court's duties in this respect is an important question which should be settled by this Court.

We submit that the Court of Appeals has failed to give effect to the intention of the Congress in charging the rule laid down by this Court in *Dobson v. Commissioner,* 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248.

In *Wright-Bernet Inc. v. Commissioner,* (C. A. 6, 172 F. (2d) 343), it was held that under the above act the Court of Appeals had the right "not only to decide questions of law, but to consider the findings of fact."

In the case at bar, however, the Court of Appeals has apparently felt bound by the decision of the Tax Court and gave only "casual" consideration to the facts in the case, even though in many respects the decision of the Tax Court

was against the undisputed and documentary evidence and hence subject to review under the above act. For example, the Court, in its initial opinion followed the finding of the Tax Court as to the lands being worth only $10.00 an acre in 1922 (R. 6), which was a very important finding but wholly contrary to the evidence; and even when, as a result of our petition for rehearing, the Court eliminated this finding from its opinion, the Court did not go further, as we submit it should have done in view of the above act, and reverse the other findings of the Tax Court, particularly as to petitioner's investments in Fairview Farming Company being worthless "prior to 1932", which were predicated upon that erroneous finding.

Likewise, it is submitted, the Court of Appeals failed to follow the said Statute in accepting the Tax Court's conclusion as to the alleged willful neglect of petitioner and the imposition of the penalty, both as to the legal conclusion and as to the findings of fact.

In this case, it is submitted, all the ultimate adverse conclusions against petitioner were conclusions of law or at least mixed questions of law and fact and hence subject to review under the above statute.

In the case of *Bogardus v. Commissioner, supra,* in which this Court reversed the Board of Tax Appeals and the Court of Appeals for the Second Circuit in their holding that certain payments constituted compensation and not tax-free gifts, the Court expressly held that all conclusions of law or at least mixed questions of law and fact were subject to judicial review, citing *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755, 762; *Helvering v. Rankin*, 295 U. S. 123, 131, 55 S. Ct. 732, 79 L. Ed. 1343, 1349.

The fact that the United States Congress has taken the trouble to pass the above mentioned act shows the im-

portance which the people of this country attach to the review by the regular courts of the decisions of the Commissioner and of the Tax Court—the right of review by the regular courts is an insurance for the people against the tyranny of a bureaucracy.

It is submitted that the Court of Appeals has in this case failed to follow the injunction underlying the said act and has thereby committed a serious error, and that the extent of its duties in this respect under said act is an important question which should be settled by this Honorable Court.

IV.

The Court of Appeals has decided important questions of local law in a way in conflict with the weight of authority and with the applicable decisions of the State Court in that the said Court has found in effect (a) that the conveyance by the said corporation of the DePriest tract to petitioner in 1922 and (b) the conveyance by the corporation of the Stewart tract to the National Loan and Exchange Bank in 1924, deprived the corporation and its stockholders of any interest in said tracts.

(a) In addition to the uncontradicted evidence in this case which shows that the DePriest tract was conveyed to petitioner expressly for the purpose of making a loan for the benefit of the corporation and so treated by him (Tr. 127-128), there is a general presumption of law, in line with the presumptions of innocence, (31 C. J. S. 748-749), and in favor of legality and against illegality, (31 C. J. S. 769-772) that "the acts of corporate directors and officers are presumed to be regular and to have been performed in good faith. In the absence of contrary evidence, the presumption is in favor of the fairness, good faith, and regularity of acts of corporate directors and officers," (31 C. J. S., 832-833).

And in any event in case of such conveyance, the land will be impressed with a trust in favor of the corporation and its stockholders, for, as the rule is stated in Corpus Juris (19 C. J. S. 784, 159-160), "a director or managing officer is precluded by his position from acquiring any interest in property adverse to that of the corporation, and the same rule applies to a corporate employee who has the general management of the corporation's business in its branch office, when he does so equity will treat his breach of duty as a fraud on the corporation, and **he will be deemed to hold as trustee for the corporation and the stockholders.** * * *" (Emphasis supplied.)

Likewise, in almost innumerable South Carolina cases, it is held, and it is settled, that an officer and director of a corporation, in dealing with the property and assets of a corporation must act for the benefit of the corporation and conveyances by the corporation of corporate property to a director are uniformly held to be impressed with a trust for the benefit of the corporation and its stockholders. See the following among almost innumerable cases: *Peeples v. Hornik,* 153 S. C. 321, 150 S. E. 802, *Henry Mercantile Co. v. Georgetown W. R. Co.,* 104 S. C. 478, 89 S. E. 480; *American Cotton Oil Co. v. Saluda Oil Mill Co.,* 107 S. C. 422, 93 S. E. 14. See also the following authorities recognizing the same principle: *Duncan v. City of Charleston,* 60 S. C. 532, 39 S. E. 265; *Andrews v. Real Estate Co.,* 87 S. C. 301, 69 S. E. 604; *Black v. Simpson,* 94 S. C. 312, 77 S. E. 1023; *Leaphart v. National Surety Co.,* 167 S. C. 327, 166 S. E. 415; *Sumter Trust Co. v. Moses,* 116 S. C. 446, 107 S. E. 918; *McCallum v. Grier,* 86 S. C. 162, 68 S. E. 466; *Scottish-American Mfg. Co. v. Clowney,* 70 S. C. 229, 49 S. E. 569; *Burnes v. Burnes* (C. C. A. 8), 137 Fed. 781; *J. H. Lane v. Maple Cotton Mill* (CA 4) 232 Fed. 421; *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.* (CA 4) 64 F. (2d)

817; 91 A. L. R. 648; 7 R. C. L. 479-481; 14a C. J. 117-119; *Michoud, et al. v. Girod,* 4 How. 503, 11 L. Ed. 1076; *Wardell v. Union Pacific R. R. Co.,* 103 U. S. 651; 26 L. Ed. 509.

Of course, it is not contended by petitioner in this case that he actually did any wrong in connection with this transfer as the evidence shows that the petitioner actually used the land and the other assets of the corporation for the benefit of the corporation and ultimately paid his own and also the corporation's obligations therefrom, (Tr. 160-163) but these cases are cited to show that in any event he was bound to recognize the interest of the corporation's stockholders in the said tracts of land while in his possession and control.

Also, under the above cited South Carolina statutes, 7704, 7710, and 7711, it was expressly provided that directors of a corporation in dissolution should be trustees of the assets and affairs thereof for the purpose of dividing such property and capital among the stockholders.

Hence, under the said statutes and under the foregoing decisions, the stockholders of the corporation retained an interest in the said tracts of land both while in the name of petitioner and while in the name of the successor company, Fairview Company, and the Court of Appeals was in error in not so holding.

(b) Also, as to the conveyance of the Stewart tract to the National Loan and Exchange Bank in 1924, the uncontradicted evidence shows that such conveyance was made as additional security for the obligations of petitioner and of the corporation held by the Bank, and was a "tentative transaction" (Tr. 159-160), was treated as a mortgage, and the property was ultimately redeemed and the obligations thereon settled in 1932 (Tr. 159-160). Under these circumstances, it is uniformly held by the South Carolina Supreme Court as well as by the weight of authority that

the conveyance to the Bank should be held to be a mortgage and hence the corporation and its stockholders retained an interest therein, *Mason v. Finley,* 129 S. C. 367, 124 S. E. 780 (1924), and *Stackhouse v. Stanton,* 179 S. C. 506, 184 S. E. 105 (1936).

Of course, the subsequent conveyance of this tract of land to Fairview Company, the successor corporation organized and controlled by petitioner, did not defeat the interest of the stockholders in said tract.

Hence, the Court of Appeals was in error in holding that the said conveyances deprived the stockholders of any interest in said tracts and rendered the stocks worthless.

V

Because the Court has decided an important question of local law in a way probably in conflict with applicable local decisions in that as to the $1,000.00 mortgage held by petitioner on the DePriest tract, the Court of Appeals has in effect held, without discussing the question, by affirming the decision of the Tax Court, that as a matter of law the mortgage was merged by the conveyance of the DePriest tract to petitioner in 1922 for the purpose of making a loan for the benefit of the corporation (R. 12).

It is uniformly held, however, by the South Carolina cases that there is no merger, even when it otherwise would operate, when merger would be against intent of the parties, and it is universally held to be against intent when it would be detrimental to the interest of the person in whom the different estates or interests became united, *McCreary v. Coggeshall,* 74 S. C. 42, 53 S. E. 978, 982 (1906), *Gainey v. Anderson,* 87 S. C. 47, 68 S. E. 888, 890, (1910), and *Thompson v. Hudgens,* 161 S. C. 450, 159 S. E. 807 (1931).

In this case the land, at the time of the conveyance to petitioner by the corporation, for the purpose of making

the $7,200.00 mortgage, was appraised at $16,785.00, and hence it was plainly to the interest of the petitioner to retain his mortgage in this land, especially as he was bound to hold the land in effect as trustee for the benefit of the corporation and its stockholders, that is, in a different right, so that under the above cases, there would be no merger.

The Court of Appeals did not discuss this question of merger but apparently thought that this mortgage was one of the mortgages satisfied in 1930.

By not considering and reversing this holding of the Tax Court, the Court of Appeals has in effect affirmed this erroneous legal conclusion by the Tax Court which is in direct conflict with the applicable local decisions. There was no other reason, stated or suggested, whatever for the Court's failure to allow to petitioner this $1,000.00 mortgage as a bad debt in 1932.

* * *

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Fourth Circuit had in the case numbered and entitled on its docket, *No. 5864, Irvine F. Belser, Petitioner, v. Commissioner of Internal Revenue, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Fourth Circuit be reversed by the

Court, and for such further relief as to this Court may deem proper.

IRVINE F. BELSER,
CARLISLE ROBERTS,
W. CROFT JENNINGS,
C. T. GRAYDON,
Columbia, S. C.
W. S. PRITCHARD,
Birmingham, Ala.,
Attorneys for Petitioner.

Dated October 5, 1949.

BRIEF IN SUPPORT OF PETITION

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Supreme Court of the United States

OCTOBER TERM, A. D., 1949

No._____

IRVINE F. BELSER, PETITIONER,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated May 2, 1949, together with petition for rehearing and order thereon, is printed in full in the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347). Judgment was entered in this case by the U. S. Court of Appeals on June 18, 1949. The order on the petition for rehearing was dated

June 13, 1949. An order was duly made and entered extending the time for filing the petition for certiorari until October 11, 1949.

* * *

The Reasons for the Allowance of the Writ are stated in the preceding petition which is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE

The case has already been sufficiently stated, it is believed, in the Summary Statement of the Matter Involved contained in the foregoing petition which is hereby adopted, and made a part of this brief.

SPECIFICATION OF ERRORS

The errors herein complained of are, it is believed, sufficiently indicated in The Questions Presented, as stated in the foregoing petition, and such statement is adopted as the Specification of Errors for this brief.

ARGUMENT

It is submitted that the Court of Appeals erred: (1) in affirming the imposition of the penalty of $918.92 for the delay in filing the income tax return, (2) in failing to allow the petitioner the loss of $14,400.00 in stock of Fairview Farming Company, and (3) in failing to allow petitioner the $9,600.00 in loans to the corporation as bad debts in 1932.

I

POINTS A & B

As to the Penalty for Alleged Delay in Filing the Return

On the point as to the penalty, there are two questions for consideration: (1) did not the uncontradicted evidence,

under the appropriate presumptions, show that the return and letter were duly mailed on September 27, 1933, and (2) if not, should the petitioner be held liable for willful neglect?

(1)

It is submitted that under the uncontradicted evidence and under the legal presumptions prevailing, the Court of Appeals should have reversed the finding of the Tax Court to the effect that the evidence of the mailing of the return "is not convincing" (R. 17)[1] and should have found, on the contrary, that the letter with return was duly mailed.

The uncontradicted evidence shows that the return, together with an explanatory letter and a check was prepared and left by petitioner "with his secretary for mailing" (R. 8). Petitioner's secretary made an affidavit in 1935, when the matter was relatively fresh in her mind, to the effect "that she regularly and duly mailed the letter containing the return and posted the same in the mail box in the National Loan & Exchange Bank Building at the time of the date thereof, to wit, September 27, 1933," (See R. 17-18).

Upon the trial of the case, which, owing largely to the fact that the final assessment was not made by the Commissioner until 1939 and to the further fact that petitioner was in the military service from 1941-1946, did not come up for trial until October, 1947, petitioner's secretary reiterated her testimony as given in the said affidavit and testified substantially that to the best of her recollection she did mail the letter in accordance with her practice (See Tr. 23-24). The letter contained the firm name and was never returned (R. 27).

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[1] The record page references are to the Appendix to the brief, filed by Petitioner with the Court of Appeals.

On this point, it is to be noted that while the Government offered several employees of the Collector's office to show that they had no record of the receipt of this letter, it did not offer the Collector himself or Mr. Gantt who made the investigation.

Under these circumstances and under the presumption "that the ordinary course of business or conduct was followed in a particular case", (31 C. J. S., 789), and that "truthfulness will be presumed in the absence of evidence to the contrary", (31 C. J. S. 746), and especially in view of the rule "that in the application of penalties 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.' Crawford, Statutory Construction, S. 240, p. 462", *Hatfried Inc. v. Commissioner*, (C. A. —) 162 F. (2), 633, *Uhl Estate Co. v. Commissioner*, (C. A. —) 116 F. (2d), 406, the Court should have found from this evidence that the letter and return were duly mailed.

It is held by many authorities that "proof of the existence of an office practice or custom in the mailing of letters, together with proof that the custom was followed in the particular instance, may constitute sufficient evidence of mailing to support a presumption of due receipt" (31 C. J. S. 782) and "the presumption is not overcome by testimony of some of the officers of a corporation or firm that they did not receive the letter, where it is not also shown that no one else in authority received it" (31 C. J. S. 787).

It is submitted that the testimony of the witness in this case, given over 14 years after the event, was as positive as could be expected under the circumstances at that time, and tends, in reality, to confirm her absolute honesty and to strengthen the accuracy of her positive affidavit of mailing given in 1935.

To hold otherwise on this point would be to penalize the petitioner for the delay in the trial cause, first, by Commissioner's failure to make the assessment until 1939, and secondly, by petitioner's five years of service during the Second World War.

But, even if it should be held that the stenographer did not mail the letter and return on September 27, 1933, petitioner, under the facts and the authorities, should not be penalized for his stenographer's negligence.

On this point, it is particularly to be noted that the uncontradicted evidence shows, and indeed the Tax Court itself has found, that petitioner, being busily engaged in the trial of a case on behalf of the South Carolina Railroad Commission, requested an extension of time beyond September 15, 1933 for filing of the return and "the revenue agent suggested that he submit an explanatory affidavit on filing the return late" (R. 17); that petitioner thereafter duly prepared his return together with a check in payment of the tax and a letter in affidavit form and "left the return and enclosures with his secretary for mailing" (R. 8), on September 27, 1933.

We have already called attention in the foregoing petition under the Reasons Relied on for the Allowance of the Writ (P. I.) to the cases from many courts which hold substantially that where the failure to file is due to the mistake or error of some other person upon whom the taxpayer had a right to rely, the taxpayer, as a matter of law, can not be held for willful neglect and the penalty imposed. Hence that argument will not be repeated here.

To hold otherwise would be, as was stated by the Court in the *Hatfried Case,* (C. A. 3) 162 F. (2d), at page 635, "an inconceivable proposition".

It will hardly be denied that in the ordinary course of business, petitioner had a right to rely upon his secretary for mailing the return and letter.

In the foregoing petition, under the Reasons Relied on for the Allowance of the Writ, in Pars. I, II, and III, we have already called attention to the provisions of S. 1141 of the Internal Revenue Code, effective September 1, 1948, and to the cases of *Hatfried v. Commissioner,* (C. A. 3), 162 F. (2d), 628, from the Court of Appeals for the Third Circuit and to the U. S. Supreme Court decisions in *Commissioner v. Scottish American Investment Co.,* Ltd., 323 U. S. 119, 124, 65 S. Ct. 169, 171, 89 L. Ed. 113, *U. S. v. Murdock,* 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381, and *Bogardus v. Commissioner,* 302 U. S. 34, 82 L. Ed. 32, which hold in effect that it is the duty of the Court of Appeals to make its own determination as to what constitutes willful neglect so as to justify the imposition of the penalty.

Hence, this argument will not be repeated here.

II

POINTS C & D

As to the loss of $14,400.00 in the Stock of Fairview Farming Company

As to the loss in the stock of Fairview Farming Company, the questions are: (1) did the conveyances by Fairview Farming Company deprive the stockholders of the company of any interest in the lands; and (2) did the lands lose their value so as to make the loss in the stocks a closed transaction, as required by the regulations (Arts. 171-191), at any time prior to the time of liquidation in 1932.

These questions are to be considered in the light of the regulations (Art. 171-191) which expressly provide that

losses in stocks must be "evidenced by closed and completed transactions" and that "mere shrinkage in the value of stocks is not sufficient".

(1)

It is submitted that under the uncontradicted evidence, and the legal principles prevailing, the conveyances did not deprive the stockholders of their interest in the lands.

(a) As to the conveyance by the company of the DePriest tract to petitioner in 1922, the uncontradicted evidence shows, and indeed the Tax Court found, that the property was conveyed by the company to petitioner, as was stated by the company's resolution, "for the purpose of facilitating a loan to take up the purchase money mortgage" (R. 3; Tr. 127-128; Exhibit 15), (the Land Bank would not make a loan to a corporation) (Tr. 127-128) and this purpose was duly carried out.

In the foregoing petition, under the Reasons Relied on for the Allowance of the Writ, (P. IV.), we have already cited the authorities and particularly the South Carolina cases, which establish the principle that the conveyances by a corporation of its property to a director are presumed to be for the benefit of the corporation, and that even if there was any evidence of a contrary intention, the Court will impress a trust upon such property for the benefit of the Corporation and its stockholders.

As was said by the court in the above cited case of *Black v. Simpson*, 94 S. C. 312; "* * * The defendant, as director and manager, was trustee not only of the corporation, but for all the stockholders, 10 Cyc. 787; 2 Pomeroy's Eq., sec. 1090" (p. 315).

As was said by this Court in the case of *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 509, "Directors of corporations and all persons who stand in a fiduciary relation

to other parties and are clothed with power to act for them are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of the parties they represent and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. * * *." (p. 511-512.)

There being no dispute in the authorities, so far as we have been able to discover, on this point, there would seem to us no need for any further quotation or citation from the authorities on this point.

Moreover, it is to be noted that while petitioner held this property under this deed and for this purpose, the charter of the company was conditionally cancelled by the Secretary of the State of South Carolina under statutes of the State of South Carolina (S. 7704, 7710, and 7711) which however expressly continued such corporations for the purpose of "dividing their capital" (S. 7704) and made the directors thereof trustees for the purpose of "dividing the corporate property among the stockholders" (S. 7710).

Under these statutes, it can hardly be questioned that petitioner held the DePriest tract in 1926 as an express and statutory trustee for the corporation and was thereby expressly authorized and empowered to divide the money and other property among the stockholders and was made responsible for the corporation's debts to the value of the property which should be in his possession.

The subsequent conveyance of this tract by petitioner in 1930 to Fairview Company, the successor corporation, under the admitted facts and the foregoing presumptions and principles, must be held rather in furtherance than in defeasance of the trust.

On this point the Tax Court held in effect (R. 11) that it would have sustained the trust relationship but for "the subsequent conveyance to Fairview", but this adverse holding, it is submitted, is wholly contrary to the uncontradicted evidence and the foregoing authorities.

If the subsequent developments are to be held to affect this question, then it is submitted the fact that petitioner took this land in 1932 as a liquidating dividend at a valuation of $7,200.00, (Tr. 133-134) when the evidence indicated that it was then worth not over $4,000.00 (R. 21) and that petitioner himself, out of his own funds, thereafter paid in full the $7,200.00 mortgage which was taken out for the benefit of the corporation, and settled all the corporation's obligations (R. 5; Tr. 159-161), should conclusively show that petitioner carried out the trust imposed by this conveyance.

The Court of Appeals did not discuss this question at all and so far as the record discloses entirely ignored it. In so doing, it is submitted, the Court of Appeals committed a serious error of law.

(b) Likewise the uncontradicted evidence shows that the conveyance of the Stewart tract to the National Loan and Exchange Bank in January 1924, was made as additional security for the obligations of petitioner and the corporation including 100 shares of stock held by the Bank and was part of a "tentative transaction" (Tr. 159) and that the property was in effect redeemed by the reconveyance to the successor corporation, Fairview Company, in 1930, and the transaction finally settled by petitioner taking up the Fairview Company mortgage and taking down the Fairview Farming Company stock in 1932 (Tr. 159-160). Under these circumstances, it is submitted, the conveyance by the corporation to the Bank should be treated as a mortgage by the

corporation, (see *Mason v. Finley,* 129 S. C. 367, 124 S. E. 780 (1924) and *Stackhouse v. Stanton,* 179 S. C. 506, 184 S. E. 105 (1936),) and the subsequent reconveyance of the property to the successor corporation, Fairview Company, under the above cited cases and principles, should be held in furtherance of the trust relationship so that the stockholders of Fairview Farming Company never lost their interest in this tract.

In connection with this point, we call attention to the case of *U. S. v. S. S. White Dental Mfg. Co.,* 274 U. S. 398, 71 L. Ed. 1120 and *New York Life Ins. Co. v. Edwards,* 271 U. S. 109, 70 L. Ed. 859, which clearly point out and show the circumstances under which a corporation may be properly said to have been wholly deprived of its property so as to render the stock and obligations thereof valueless.

In the *S. S. White Dental Mfg. Co. case, supra,* the Court expressly pointed out the fact that the transaction evidencing the loss there was a seizure of the property of the company by the German government and that the loss resulted because the company-debtor "was as a result of the sequestration was left without property or assets of any kind."

In the case at bar, however, petitioner could not claim that the Fairview Farming Company, in which he held title to all the stock (though 100 shares were pledged with the National Loan and Exchange Bank), was without property or assets of any kind, particularly as he himself, either in his own name or in the name of Fairview Company which he owned, had possession and control of all the company's assets, which under the above statutes and decisions, he held as trustee and was bound to divide among the company's creditors and stockholders.

(2)

As to the value of the lands, it is submitted that there is no evidence in the record to justify a finding that the lands lost their value so as to make the loss in the stocks a closed transaction at any time prior to the time of liquidation in 1932.

On this point, we have already called attention in the petition, under the Summary Statement of the Matter Involved and the Reasons Relied on for the Allowance of the Writ (P. III), to the fact that the Tax Court's opinion contained a finding to the effect that the lands were worth only $10.00 an acre in 1922 (R. 6) and that the Court of Appeals' initial opinion contained a like finding, but that as a result of our petition for rehearing the Court of Appeals struck out this finding from its opinion. This action of the Court of Appeals, we take it, amounts to a reversal of this finding of fact by the Tax Court.

There was no other finding by either Court as to the value of the lands at any other period. It is evident that the opinions of both courts were permeated and infected by the above mentioned erroneous finding of fact and that, when this finding was wiped out, there was no basis for a finding that the stocks had lost their value because of any decline in the value of the lands down to 1932.

The evidence conclusively showed that in 1922 the DePriest tract was officially appraised at $16,785.00 (R. 21) and a loan based upon such valuation made by the First Carolinas Joint Stock Land Bank. This was an appraisal of an average of over $50.00 an acre for this tract of land. The evidence shows conclusively also that the Stewart tract, which joins the DePriest tract, had a corresponding value (R. 19-21).

The fact that there was value in these lands above the first mortgages thereon, is also shown by applying the prices of cotton as shown by the New York Exchange Year Book, Exhibit 3, to the value of the lands which will show that at no time previous to 1932 did the land reach any such value as $10.00 per acre or any other value from which it could be said with any certainty that there was no equity in the land down to 1932. The proportionate values of these two tracts of land, based upon the undisputed average prices of cotton during the year in question, were approximately as follows (considering the years as running from July to July):

Year	*Average Price of Cotton* (as shown by New York Exchange Year Book)	*Approximate Proportionate Value of the Land* DePriest tract (331 acres)	Stewart tract (434 acres)
1919-20	$38.34	$25,177.00	$26,336.00
1920-21	$16.66	$10,743.00	$11,280.00
1921-22	$18.09	$11,522.00	$12,098.00
1922-23	$25.83	$16,785.00	$17,619.00
1923-24	$30.14	$19,482.00	$20,456.00
1924-25	$24.22	$15,857.00	$16,650.00
1925-26	$19.68	$12,587.00	$13,216.00
1926-27	$14.40	$10,071.00	$10,575.00
1927-28	$19.72	$12,600.00	$13,230.00
1928-29	$18.67	$12,086.00	$12,690.00
1929-30	$15.79	$10,071.00	$10,575.00
1930-31	$ 9.61	$ 5,885.00	$ 6,179.00
1931-32	$ 5.89	$ 3,859.00	$ 4,052.00
1932-33	$ 7.15	$ 4,699.00	$ 4,934.00

It is conceded that the values as shown in the foregoing tabulation are only approximate and it is also conceded that the value of petitioner's stock based upon said valuations of the land underwent considerable fluctuations. It is submitted, however, that the foregoing tabulation does show

that such fluctuations were not sufficient to warrant or require the charge off of the entire stock as a loss as a completed transaction at any time down to 1932. (See Regulations, 45 Art. 171-191) (Also see *U. S. v. S. S. White Dental Mfg. Co.*, 274 U. S. 398, 71 L. Ed. 1120 and *New York Life Insurance Co. v. Edwards*, 271 U. S. 109, 70 L. Ed. 859).

III

POINTS E & F

Loans to Corporation not ascertained as bad debts until 1932

As to the loans to the corporation, it is submitted that the error of the Court of Appeals is clearly shown by a consideration of the status of the $1,000.00 mortgage held by petitioner covering the DePriest tract.

This mortgage represented part of the money advanced by petitioner to the corporation for the purpose of completing the purchase of the lands in question and as to it the Tax Court itself found that "the $1,000.00 loan was secured by a second mortgage on the DePriest tract", the first mortgage on which was a $7,200.00 loan from the First Carolinas Joint Stock Land Bank (R. 10).

On this point, the Court of Appeals had found in effect that its holding as to the stock was "equally applicable, *mutatis mutandis*, to the bad debts owed by this corporation to the taxpayer", and the court had previously held in effect that the losses in the stock were due to the fact that the corporation had transferred the legal title to the two tracts of land which it owned.

It is submitted, however, that the alleged reason for holding the stock worthless is wholly inapplicable to the mortgages. It is elementary that mortgages are not affected by conveyances of the land covered by the mortgage. Cer-

tainly this point does not require further discussion before this Court.

The Court of Appeals further suggested in its initial opinion that the satisfaction by petitioner of certain of these mortgages in connection with the reconveyance of the Stewart tract to petitioner in 1930 "strengthened" the conclusion that the loans were "ascertained to be worthless prior to 1932". But the uncontradicted evidence conclusively shows that the $1,000.00 DePriest mortgage was not among the mortgages satisfied by petitioner at that time and the Court was wholly in error on this point.

The Tax Court had held (R. 12) that this $1,000.00 mortgage was merged by the conveyance of the DePriest tract to petitioner in 1922, but this was a conclusion of law and was, it is respectfully submitted, directly contrary to the South Carolina authorities on the point which hold that a merger will not be presumed where it is contrary to the intention of the parties and it is uniformly held to be against the intent where it would be detrimental to the interest of the person in whom the interests in the estate became united, *McCreary v. Coggeshall,* 74 S. C., 42, 53 S. E., 978, 982 (1906), *Gainey v. Anderson,* 87 S. C., 47, 68 S. E., 888, 890 (1910), and *Thompson v. Hudgens,* 161 S. C., 450, 159 S. E., 807 (1931).

At the time of the conveyance of this tract to petitioner in 1922, as we have already pointed out in our petition, the land was appraised at $16,785.00 and the first mortgage to the Bank was for only $7,200.00 and moreover petitioner was bound to hold the land in trust for the benefit of the stockholders and the creditors. So it was clearly to the interest of the petitioner to retain this mortgage, and that it be not merged.

The Court of Appeals did not discuss this question of merger at all and in so doing, it is submitted, made a serious error of law.

* * *

Moreover, as to the value of the land securing this mortgage, while neither court discussed this question specifically, it is submitted, there was no showing in the record of any such decline in the value of the lands securing this mortgage as to require petitioner to ascertain and charge off this mortgage as a loss at any time prior to 1932.

On the contrary, the foregoing tabulation and the undisputed evidence as to the price of cotton, by which the value of the land was largely governed, indicate that this land has an average value throughout the 1920's and down to the 1930's of about $15,000.00. At no time prior to 1931 did the land have any value below $10,000.00 so that there was at all times sufficient equity in this land above the $7,200.00 mortgage to the Land Bank to take care of petitioner's $1,000.00 mortgage.

* * *

As to the $8,500.00 mortgages held by petitioner on the Stewart tract, we think it is equally demonstrable that these mortgages were not extinguished or ascertained to be worthless merely by reason of petitioner's satisfaction of such mortgages at the time of the reconveyance of the Stewart tract to the successor corporation, Fairview Company, in 1930 but that such satisfactions were based upon other valid considerations and that petitioner was subrogated to a corresponding interest in the substituted $18,500.00 mortgage by Fairview Company. However, inasmuch as we have already discussed this question to some extent in the foregoing petition under the Summary Statement of the Matter Involved (II & III), and inasmuch as we believe the foregoing argument shows beyond peradventure that the

Court of Appeals erred as to the $1,000.00 mortgage and as we believe that such error is sufficient to warrant the granting of a writ of certiorari, we will not here burden the Court with a further discussion of this particular aspect of the matter.

* * *

Moreover, in considering this question it is to be noted that it is established by the authorities and in fact directed by the regulations that such bad debts should not be claimed or allowed until they were ascertained by the taxpayer to be worthless (See Regs. 77, Arts. 191, 194). These regulations provide in part as follows:

> Art. 191.—"Before a taxpayer may charge off and deduct a debt in part, he must ascertain and be able to demonstrate, with a reasonable degree of certainty, the amount thereof which is uncollectible. * * *"
>
> Art. 194.—"* * * A taxpayer (other than a dealer in securities) possessing debts evidenced by bonds or other similar obligations cannot deduct from gross income any amount merely on account of market fluctuation * * *."

The following among many other cases hold that the loss in such bonds and mortgages cannot be claimed by, or charged against, a taxpayer until they have been ascertained by the taxpayer to be worthless: *Forbes v. Commissioner,* (C. A. 4) 62 F. (2d) 571; *U. S. v. S. S. White Dental Mfg. Co.,* 274 U. S. 398, 71 L. Ed. 1120; *New York Life Ins. Co. v. Edwards,* 271 U. S. 109, 70 L. Ed. 859.

In the above cited *New York Life Insurance Company case, supra,* the U. S. Supreme Court refused to allow a deduction on account of an alleged loss in the value of bonds held by an insurance company, on the ground that no loss was actually ascertained. The Court in its decision said:

> "Unless the addition amounted to a loss 'actually sustained within the year' no deduction could be made

therefor. Obviously, no actual ascertainable loss had occurred. All of the securities might have been sold thereafter above cost. **The result of the venture could not be known until they were either sold or paid off.**" (Emphasis added.) (P. 862.)

So, in the case at bar petitioner could not properly charge off his investment in the Fairview Farming Company mortgages at any time previous to 1932 because at any time prior to that year the corporation's assets might have been sold or disposed of for enough to realize something on the loans. This, as we have already pointed out, is especially true in reference to the $1,000.00 mortgage on the DePriest tract.

Many decisions of the Board of Tax Appeals and also the Courts recognizing and applying the above principle are abstracted in the notes in the U. S. Code Annotated, Title 26, Internal Revenue, Section 925; pps. 116-124, some of which abstracts are as follows:

"83.

Account is not worthless merely because slowing down of business in particular trade makes collection slow or temporarily uncertain. 2 B. T. A. 335."

"81.

Secured debts may be charged off only when security is liquidated and actual amount of bad debt is ascertained. 2 B. T. A., 747."

"81.

Where sole stockholder made loans in expectation eventually of working out affairs of corporation, and corporation owned assets sufficient to reimburse taxpayer in part, held that loans were not deductible. 3 B. T. A., 499."

Hence, it is submitted, under the foregoing undisputed facts and the established authorities, it should not be held that these mortgages had been ascertained by petitioner to be worthless at any time prior to the liquidation by him of the corporation in 1932.

CONCLUSION

In conclusion, it is submitted, that if the decision of the Court of Appeals is not reversed, a serious injustice will have been done to petitioner.

To hold that petitioner should be penalized and charged with willful neglect on account of the negligence of his stenographer would be, as stated by the court in the *Hatfried Case,* "an inconceivable proposition". As to petitioner's investments in the corporation, it is apprehended that if the corporation had continued down to 1932 to hold the legal title to the tracts of land and the petitioner in 1932 had had a formal liquidation of the corporation and charged off and claimed these investments as losses, there would have been no serious question as to his right so to do. It is submitted, however, that in equity and reality, this was the true situation and to hold otherwise would be to allow form to override substance.

For all the foregoing reasons, it is respectfully but earnestly submitted that the petition for writ of certiorari should be granted and the decisions of the United States Court of Appeals and the Tax Court should be reversed.

All of which is respectfully submitted.

IRVINE F. BELSER,
Columbia, S. C.,
CARLISLE ROBERTS,
Columbia, S. C.,
W. CROFT JENNINGS,
Columbia, S. C.,
C. T. GRAYDON,
Columbia, S. C.,
W. S. PRITCHARD,
Birmingham, Ala.,
Attorneys for Petitioner.

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